No. 89-1069

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1989

MILTON M. CLELAND and GLADYS G. CLELAND,

Petitioners,

vs.

GRAYBAR ELECTRIC COMPANY, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

This case presents an opportunity to request the guidance of this Court to the lower courts after this Court's decision in *Firestone Tire and Rubber Co. v. Bruch* as to the following issues:

1. Whether the right to trial by jury should be accorded to an ERISA plan beneficiary in an action seeking money damages and otherwise within the scope of the right to trial by jury as it existed in 1791.

2. Whether under the *Bruch* analysis of ERISA plans, whereby contract law principles apply, discovery should be allowed of the process of plan drafting and claims administration practices and procedures.

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No.

In The

Supreme Court of the United States

October Term, 1989

MILTON M. CLELAND and GLADYS G. CLELAND,

Petitioners,

vs.

GRAYBAR ELECTRIC COMPANY, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

INTRODUCTORY STATEMENT

Fronefield and deFuria, by Leo A. Hackett, Esquire, on behalf of Milton M. Cleland and Gladys G. Cleland, husband and wife, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The decision of the court of appeals (2a) is not reported. The decision of the district court (17a) is not reported.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was dated September 12 1989 (2a). A petition for rehearing was denied on October 3, 1989 (1a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Employee Retirement Income Security Act of 1974 (ERISA), P.L. 93-406, 88 Stat. 874, 29 U.S.C. § 1001 *et seq.*, provides:

1. Section 502, 29 U.S.C. § 1132(a)(1)(B):

> A civil action may be brought . . . by a participant or beneficiary . . . to recover benefits due to him under the terms of the plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan . . . .

2. Section 502, 29 U.S.C. § 1132(c)(1)(B):

> Any administrator . . . who fails or refuses to comply with a request for any information which such administrator is required by this title to furnish to a participant or beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the administrator) . . . may in the court's discretion be personally liable . . .

> in the amount up to $100.00 a day from the date of such failure or refusal . . . .

3. Section 104, 29 U.S.C. § 1024(b)(4):

> The administrator shall, upon written request of any participant or beneficiary, furnish a copy of the latest updated summary plan description, plan description . . . contract or other instrument under which the plan is established or operated.

The Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA), P.L. 100-203, 101 Stat. 1330, 26 U.S.C. § 4980B(f)(1) provides:

> A group health plan meets the requirements of this subsection only if each qualified beneficiary who would lose coverage under the plan as a result of a qualified event is entitled to elect, within the election period, continuation coverage under the plan.

STATEMENT OF THE CASE

This case arises from a dispute regarding coverage under a medical insurance policy provided by Graybar Electric Company, Inc. to Gladys G. Cleland as the wife of a retired former Graybar employee, her husband Milton M. Cleland. Mrs. Cleland has suffered from rheumatoid arthritis for the last 30 years. Her husband was employed at Graybar for over 25 years through August 1, 1974, when he elected an early retirement. Under the terms of Mr. Cleland's early retirement election, he was entitled to have his Graybar health insurance benefits continue, with coverage for Mrs. Cleland to continue as well in exchange for a monthly payment deducted from his pension.

The health benefits program provided by Graybar as former employer of the retired Mr. Cleland is a so-called "welfare plan" subject to the provisions of the Employee Retirement Income Security Act ("ERISA") and certain provisions established in the Consolidated Omnibus Budget Reconciliation Act ("COBRA"). The program is a self-insured plan administered by Graybar with an administrative services agreement by Graybar with Prudential Insurance Company.

Due to her serious and deteriorating physical condition occasioned by her rheumatoid arthritis, Mrs. Cleland was found eligible for Medicare benefits in 1973 (prior to Mr. Cleland's early retirement), nearly 15 years before her 65th birthday. She was also found to be qualified, due to her condition, for home skilled nursing care under Graybar's medical program prior to reaching age 65. Graybar in fact paid for such home care under the Group Major Medical Plan portion of its Health Benefits Program for several years until Mrs. Cleland reached age 65. When she reached age 65, Graybar refused to allow her to retain her Group Major Medical Plan coverage and permitted her coverage under only its Supplemental Major Medical Plan. She was transferred subject to her protest: The Group Major Medical Plan provided a maximum lifetime benefit of $500,000, while, on the other hand, the Supplemental Major Medical Plan provided a maximum benefit of only one-tenth of that amount, *i.e.*, only $50,000. When the $50,000 maximum lifetime benefit of the Supplemental Plan was reached, Graybar simply stopped paying benefits; Mr. and Mrs. Cleland have been paying since. As of December 31, 1988, just prior to trial in the district court, the Clelands paid over $135,000 for medical expenses which would have been paid by Graybar if Mrs. Cleland had not been transferred to the Supplemental Plan. The Clelands expect that Mrs. Cleland's need for such extraordinary care will continue for an indefinite time into the future, probably the rest of her life.

After Mr. Cleland retired in August of 1974, Graybar established an amended Group Benefit Plan, but Mr. and Mrs. Cleland were denied the opportunity to participate in that plan.

Through an attorney, Mr. and Mrs. Cleland demanded access to plan documents as is their right under ERISA on April 13, 1987. These documents were never provided to them by Graybar until this case was in the discovery stage in the trial court.

The complaint instituting this case was filed by Mrs. Cleland alone. As the sole plaintiff, she sought a declaratory judgment in her favor establishing medical insurance coverages for her through the medical insurance plan maintained by Graybar for its employees, retirees and dependents. The complaint also sought a declaratory judgment under COBRA plus statutory penalties provided in ERISA for Graybar's failure to provide the requested plan documents.

The Summary Plan Description of Graybar's plan provides as follows:

> If you are retired and/or an eligible dependent is covered by the U.S. Government's Medicare program before age 65, you may still retain your Group Major Medical coverage. In such case, Medicare is the primary plan under the coordination of benefits provisions.

Mrs. Cleland qualified for Medicare before reaching age 65. It has been the Cleland's contention that, as stated in Graybar's Plan, they may "still retain" Group Major Medical coverage and were not to be relegated to the Supplemental Plan. Graybar argued in the courts below that the plain language of this provision conflicted with a general provision providing for transfer to the Supplemental Plan.

Mrs. Cleland was granted leave of the trial court to file an amended complaint. When the amended complaint was filed, Mr. Cleland joined as a plaintiff for the first time. The amended complaint included for the first time in the action Mr. Cleland's claim for damages measured by the amounts of medical bills paid by him for Mrs. Cleland's extraordinary medical care since Graybar's denial of coverage therefor upon reaching the $50,000 "cap" in the Supplemental Plan. The amended complaint was duly endorsed with Mr. Cleland's demand for a trial by jury inasmuch as the claim for money damages as well as Mr. Cleland's presence as a party had not theretofore been a part of the case.

In procedural rulings prior to trial, the district court denied Mr. Cleland's demand for a jury trial and refused to allow certain discovery by Mr. and Mrs. Cleland directed to Graybar's drafting and administration of claims under the plan.

REASONS FOR GRANTING THE WRIT

This case presents important issues concerning the litigation of ERISA matters after this Court's decision in *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. ____, 109 S. Ct. 948, 103 L. Ed. 2d 80 (1989): the scope of allowable discovery and the right to trial by jury. The practical impact for Mr. and Mrs. Cleland in their case is obvious. Graybar unilaterally transferred Mrs. Cleland out of the Group Major Medical Plan and into its Supplemental Major Medical Plan causing an attendant reduction in the lifetime medical payments benefit from one-half million dollars to a figure only one-tenth of that amount. The lifetime "cap" under the Supplemental Plan was quickly reached and resulted in Graybar's refusal to pay any further benefits leaving Mr. and Mrs. Cleland to pay over $135,000 from their own savings and pension to pay for Mrs. Cleland's necessary care before the case was even tried.

To a significant degree, in this case — and all ERISA cases after this Court's *Bruch* decision — the intention of the parties and the history of their prior dealing takes on an added and vital relevance in ascertaining the meaning of plan clauses subject to disputes of interpretation. This Court held in *Bruch* that "the trust law de novo standard of review is consistent with the traditional interpretation of employee benefit plans" and the lower courts were directed to review "the employee's claim as [they] would any other contract claim — by looking to the terms of the plan and other manifestations of the parties' intent." Accordingly, discovery denied by the district court whereby Mr. and Mrs. Cleland sought information relating to the process of preparation of the Graybar plan as well as the course of dealing by Graybar with its employees and retirees and their dependents in claims administration takes on added significance. The spirit of the *Bruch* decision is also throttled by limiting discovery: Without the means to establish the validity of benefits claims by

reference to the drafting process and the claims administration process, beneficiaries' rights are similarly reduced to levels under ERISA which were less than those enjoyed by employees pre-ERISA. At least one court has already recognized the impact of the *Bruch* analysis. In *Schultz v. Metropolitan Life Insurance Company*, 872 F.2d 676 (5th Cir. 1989), the Fifth Circuit recognized in a pension case that "When a contract is reasonably subject to different interpretations, the conduct of the parties before the advent of a controversy may be relied upon to discover the parties' understanding of the contract." The *Schultz* court considered such an inquiry to be vital to construction of the plan therein at issue as a contract as mandated by *Bruch*. Administration of similar claims was also considered quite relevant in the Fifth Circuit's *Schultz* decision. Such is a well-established principle of contract law: *See* 3 *Corbin on Contracts* § 558 (1960) ("In the process of interpretation of the terms of a contract, the court can frequently get great assistance from the interpreting statements made by the parties themselves or from their conduct in rendering or in receiving performance under it").

The denial of Mr. Cleland's demand for jury trial on his entry into the case in the amended complaint seeking money damages for the first time raises another significant issue applicable to all ERISA cases after *Bruch*. The pre-*Bruch* analysis by the courts in assessing demands for jury trial in ERISA cases was generally limited to a declaration that equitable relief was being sought and, therefore, the right to jury trial would not be available. With contract law analysis applicable after *Bruch*, however, these decisions are of questionable continued vitality and this Court's guidance is essential to guide the lower courts in future trials. If the cases are to be determined according to contract law principles, the right to trial by jury should be recognized as in other contract cases.

The Seventh Amendment to the United States Constitution,

providing that "the right to trial by jury shall be preserved" has been consistently applied by this Court with recognition of a strong federal policy favoring trial by jury: *Pernell v. Southall Realty*, 416 U.S. 363 (1974); *Ross v. Bernhard*, 396 U.S. 531 (1970); *Dairy Queen v. Wood*, 369 U.S. 469 (1962); *Beacon Theatres v. Westover*, 359 U.S. 500 (1959). More recently, *Tull v. United States*, 481 U.S. 412 (1987); and *Granfinanciera, S.A. v. Nordberg*, ___ U.S. ___, 109 S. Ct. 2782 (1989) belie "pigeon hole" analysis on an easy legal/equitable distinction. At least one trial court has upheld trial by jury in an ERISA action seeking damages based on a breach of contract theory: *Donovan v. Robbins*, 579 F. Supp. 817 (N.D. Ill. 1984). Another has ventured to predict that this Court's *Tull* analysis indicates that trial by jury would be allowed by this Court in ERISA cases: *Springer v. Wal-Mart Assocs. Group Health Plan*, 714 F. Supp. 1168 (N.D. Ala. 1989). The decision relied upon by the trial court herein in denying Mr. Cleland's demand for jury trial, *Turner v. CF&I Steel Corp.*, 770 F.2d 43 (3d Cir. 1985) no longer has vitality after *Bruch* inasmuch as the decision in that case depended on the incompatibility of trial by jury with the "arbitrary and capricious" standard applicable in the days before the *Bruch* decision. Denial of the right to trial by jury is simply inconsistent with *Bruch*. A jury is uncalled for where review is under an "arbitrary and capricious" standard. Where contract rights are asserted, and especially where, as here, money damages are sought, the scope of jury trial as it existed in 1791 is present. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979).

CONCLUSION

Congress in ERISA left open the question of trial by jury. The denial of that right in a case seeking money damages is inconsistent with the pronouncements of this Court on the scope of the right to trial by jury. In addition, under *Bruch* this Court recognized that ERISA plans are subject to analysis under trust law and contract law, and discovery directed to plan drafting and claims administration must be allowed, as in any contract case, as evidence of the intention of the parties to properly construe what under *Bruch* is deemed to be a contract between them.

For all of the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be granted.

Respectfully submitted,

LEO A. HACKETT
DAVID C. CORUJO
FRONEFIELD & DEFURIA
Attorneys for Petitioners

APPENDIX A — SUR PETITION FOR REHEARING DATED OCTOBER 3, 1989 TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 89-1268

MILTON M. CLELAND and GLADYS G. CLELAND,

Appellants

V.

GRAYBAR ELECTRIC COMPANY, INC.

BEFORE: MANSMANN, NYGAARD, and ALDISERT,
Circuit Judges

SUR PETITION FOR REHEARING

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this court and no judge who concurred in the decision having asked for rehearing, the petition for rehearing is denied.

By the Court,

s/ Mansmann
Circuit Judge

Dated: October 3, 1989

APPENDIX B — JUDGMENT ORDER DATED SEPTEMBER 12, 1989 OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 89-1268

MILTON M. CLELAND AND GLADYS G. CLELAND

Appellants

v.

GRAYBAR ELECTRIC COMPANY, INC.

Appellee

Appeal from a Final Order of the United States District Court
for the Eastern District of Pennsylvania
D.C. Civil Action No. 88-1844
District Judge: Honorable Joseph L. McGlynn, Jr.

Submitted Under Third Circuit Rule 12(6)
September 6, 1989

BEFORE: MANSMANN, NYGAARD, and ALDISERT,
Circuit Judges.

JUDGMENT ORDER

After consideration of all contentions raised by appellant, and for the reasons set forth in the district court opinion by the Honorable Joseph L. McGlynn, Jr., Eastern District, it is

Appendix B

ADJUDGED and ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appellant.

By the Court,

s/ Mansmann
Circuit Judge

Attest:

s/ M. Elizabeth Ferguson
Chief Deputy Clerk

DATED: September 12, 1989

Costs taxed in favor of the appellee as follows:

Brief $144.20

Certified as a true copy and issued in lieu
of a formal mandate on October 11, 1989

Test: s/ M. Elizabeth Ferguson

Chief Deputy Clerk, United States Court of
Appeals for the Third Circuit

APPENDIX C — FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ORDER DATED FEBRUARY 27, 1989 OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION

No. 88-1844

MILTON M. CLELAND and GLADYS G. CLELAND, his wife

v.

GRAYBAR ELECTRIC COMPANY, Inc.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

McGlynn, J. - February 27, 1989

Plaintiffs, Milton M. Cleland and Gladys G. Cleland, filed this action to challenge defendant's, Graybar Electric Company, Inc. ("Graybar"), refusal to permit Mrs. Cleland to continue coverage under the Group Major Medical Plan once she reached age 65. A non-jury trial was held before this court on January 24, 1989. Judgment will be entered for the defendant and against the plaintiffs in accordance with the following findings of fact and conclusions of law required by Fed. R. Civ. P. 52.

This court has jurisdiction pursuant to 28 U.S.C. §1331. The federal questions arise under the Employment Retirement Income Security Act ("ERISA"), 29 U.S.C. §1132(c) [ERISA §502(c)] and the Consolidated Omnibus Budget Reconciliation Act

Appendix C

("COBRA"), 26 U.S.C. §162. There is also diversity jurisdiction. 28 U.S.C. §1332. Plaintiffs, Milton M. Cleland ("Mr. Cleland") and Gladys A. Cleland ("Mrs. Cleland"), are adult individuals residing at 41 Clearview Avenue, Chalfont, Pennsylvania 18914. Defendant, Graybar Electric Company, Inc. ("Graybar"), is a New York corporation registered to conduct business in the Commonwealth of Pennsylvania. The plaintiff Gladys G. Cleland has suffered from rheumatoid arthritis for over thirty years. Her husband, plaintiff Milton M. Cleland was an employee of the defendant Graybar for approximately twenty-six years. In 1974, Mr. Cleland elected early retirement from Graybar and was thus entitled to have his Graybar Health Benefit Program continued.

For the purposes of trial, counsel for both plaintiffs and defendant agreed to the following numbered stipulated facts:

1. The Summary Plan Description in effect for the applicable period is Exhibit P-1.

2. The Summary Plan Description which was drafted and prepared by the defendant accurately reflects and states the provision of the defendant's Group Major Medical Plan.

3. The plaintiff Gladys G. Cleland is the spouse of Milton M. Cleland.

4. The plaintiff Milton M. Cleland retired from defendant Graybar on August 1, 1974.

5. Plaintiff Milton M. Cleland was employed by Graybar from September 22, 1948 to August 1, 1974.

6. From the date Mr. Cleland commenced employment with

Graybar, he and Mrs. Cleland were entitled to the benefits available under various Graybar employee benefit programs.

7. The letter dated October 23, 1987 between Eileen M. Bonner, M.D., and Rawle & Henderson, with report attached (Exhibit P-2), concerned the need of Gladys Cleland for skilled nursing care.

8. As a result of the report set forth in Exhibit P-2, Prudential, with Graybar's money, paid to plaintiffs benefits under Graybar's Group Major Medical Plan (P-1) for skilled home nursing care for Mrs. Cleland because of her rheumatoid arthritis and other associated medical conditions.

9. Exhibit P-J contains a list of payments by Prudential, with Graybar's money, to plaintiffs for skilled nursing care, and other benefits, under defendant's Group Major Medical Plan and Supplemental Major Medical Plan as a result of Mrs. Cleland's rheumatoid arthritis and other associated medical conditions.

10. The overall lifetime maximum benefits under the Group Major Medical Plan (P-1) is five hundred thousand ($500,000.00) dollars. Under Graybar's Supplemental Major Medical Plan (as described in P-9), the overall lifetime maximum benefit is fifty thousand ($50,000.00) dollars.

11. On May 25, 1987, Mrs. Cleland turned age sixty-five.

12. Mr. Cleland became sixty-five on January 5, 1986.

13. The Summary Plan Description (P-1) was provided to Mr. Cleland by defendant before April 13, 1987.

Appendix C

14. Plaintiff Mrs. Cleland was enrolled in defendant's Supplemental Major Medical Plan (P-9) as of May 1, 1987, without prejudice to her claim that she was entitled to continued coverage under the Group Major Medical Plan.

15. By letter dated April 13, 1987, plaintiffs requested a copy of defendant's health benefits plan and/or Group Major Medical Plan. Defendant received this request on or about April 17, 1987.

16. Defendant's health insurance benefit plan is self-insured.

17. Defendant did not provide plaintiffs with a copy of D-1 until May 20, 1988 in response to Plaintiff's First Interrogatories and Request for Production of Documents.

18. Under the Group Major Medical Plan, Graybar paid Mrs. Cleland $36,977.63 and $50,000.00 under the Supplemental Major Medical Plan (P-3).

19. As of December 31, 1988, Mr. Cleland had paid for expenses in the amount of $135,463.57 which amount would be paid under Graybar's Group Major Medical Plan if Mrs. Cleland was a covered dependent thereunder.

Because of her rheumatoid arthritis, Mrs. Cleland was determined to be eligible for Medicare benefits in 1973, prior to her sixty-fifth birthday. She also qualified for skilled nursing care under Graybar's Health Benefit Program before reaching age sixty-five. Graybar paid Mrs. Cleland for such skilled nursing care under the Group Medical Plan portion of its Health Benefit Program prior to Mrs. Cleland reaching sixty-five years of age. Thereafter, Graybar permitted Mrs. Cleland coverage only under the Supplemental Major Medical Plan. She received the limit under

the Supplemental Major Medical Plan. Mrs. Cleland then appealed Graybar's decision to transfer her coverage from the Group Major Medical Plan to the Supplemental Major Medical Plan.

Specifically, the Graybar Health Benefits Program is a self-insured plan administered by Graybar in conjunction with an administrative services agreement with Prudential Insurance Company to provide claim processing services. It is a welfare benefit plan, which provides medical, surgical, hospital and related benefits to participants and beneficiaries. As such, the Plan is governed by the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§1001, *et seq. Metropolitan life Insurance Company v. Taylor,* 481 U.S. 58, 107 S. Ct. 1542 (1987); *Pilot Life Insurance Company v. Dedeaux,* 481 U.S. 41, 107 S. Ct. 1549 (1987). The parties agree that ERISA is applicable to the Plan at issue.

ERISA provides the exclusive remedy for the claims of the plaintiffs. The Act states as follows:.

> Except as provided in subsection (b) of this section, the provisions of this subchapter and Subchapter III of this chapter shall supercede any and all state laws insofar as they may now or hereafter relate to any employee benefit plan . . . .

29 U.S.C. §1144(a). Additionally, since this involves a suit by a beneficiary to recover benefits from a covered plan, it falls within §502(a)(1)(b) of ERISA, which provides an exclusive federal cause of action for resolution of such disputes. *Pilot Life Insurance Company v. Dedeaux,* 107 S. Ct. at 1555.

The first question before the court is whether plaintiffs are

entitled to a *de novo* review of the denial of benefits by defendant. Although the defendant argues that the ruling by the United States Court of Appeals for the Third Circuit, *Bruch v. Firestone Tire & Rubber Co.*, 828 F.2d 134 (3d Cir. 1987), *cert. granted*, 108 S. Ct. 1288 (1988), was distiguishable from the present case, the Supreme Court decision makes it evident that it is not. *Firestone Tire & Rubber Co. v. Bruch*, 1989 U.S. LEXIS 599 (February 21, 1989).

The issue before the Third Circuit was whether the district court's ruling granting employer's motion for summary judgment was based upon the court's deference to the plan administrator's decisions. The district court had applied the arbitrary and capricious standard to the administrator's decision and then upheld the administrator's decision. *Bruch*, 828 F.2d at 137. The Third Circuit found that the employer who had established the plan, had also solely administered the claims and decided what benefits the employee benefit plan would provide. Specifically, the plan in question was "unfunded", and Firestone was serving as both the "administrator" and the funding source. Since the benefits provided by the plan came out of the general corporate funds, the Third Circuit determined that the administrator-employer had an interest adverse to that of the beneficiaries. In view of the possibility of a "lack of impartiality" on the part of the administrator as well as the apparent "conflict of interest", the court rejected the application of the arbitrary and capricious standard. *Bruch*, 828 F.2d at 144.

In the present case, the plan fund, used to pay claims and expenses, is comprised of contributions from more than one source. While Graybar executives participated in interpreting the eligibility provisions of the plan, Prudential was primarily responsible for making the claims decisions. As set forth in the

Appendix C

Summary Plan Description ("SPD"), the "plan administrator" is the Prudential Insurance Company of America. Additionally, the Administrative Services Agreement between Prudential and Graybar designates Prudential as the "appropriate named fiduciary" for the purposes of the plan. However, although the circumstances in the present case do not raise the same concerns of "lack of impartiality" or "conflict of interest" the *de novo* review is the appropriate standard for reviewing Graybar's denial of benefits to the Clelands.

Specifically, the Supreme Court in *Firestone* determined that the principles of the law of trusts control the standard of review regarding a denial of benefits under a health benefits plan. The Court found that as "with contractual provisions, courts construe terms in trust agreements without deferring to either party's interpretation." *Id.* at ¶ 21.[1] The Court held that "a denial of benefits challenged under § 1132(a)(1)(B) is to be reviewed under a *de novo* standard unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan." *Id.* at ¶ 26. Furthermore, the Supreme Court stated that "for purposes of actions under § 1132(a)(1)(B), the *de novo* standard of review applies regardless of whether the plan at issue is funded or unfunded and regardless of whether the administrator or fiduciary is operating under a possible or actual conflict of interest." *Id.* at ¶ 26-27.

---

1. The court pointed out that "[a]ctions challenging an employer's denial of benefits before enactment of ERISA were governed by principles of contract law. If the plan did not give the employer or administrator discretionary or final authority to construe uncertain terms, the court reviewed the employee's claim as it would have any other contract claim — by looking to the terms of the plan and other manifestations of the parties' intent." *Firestone, Id.* at ¶ 22.

Appendix C

Plaintiffs allege that the defendant has improperly denied Mrs. Cleland coverage under Graybar's Group Major Medical Plan which provides for a lifetime maximum of $500,000.00. Under the terms of Graybar's Health Benefits Program, a covered beneficiary is generally transferred from the Group Major Medical Plan to the Supplemental Major Medical Plan at age 65, with its limitation of $50,000.00. In the present case, the language in dispute on page 12 of the Summary Plan Description provides:

> If you are retired and you and/or an eligible dependent is covered by the U.S. Government's Medicare program before age 65, you may still retain your Group Major Medical coverage. In such case, Medicare is the primary plan under the Coordination of Benefits provisions.
>
> If you are an active employee age 65, or your dependent spouse is age 65, you may elect to continue coverage with the Company Plan as primary. If you elect Medicare as the primary plan, coverage under the Company Plan will cease.

On the basis of the terms above, Mrs. Cleland claims the right to continue coverage under the Group Major Medical Plan after age 65, while her need for skilled nursing care continues. Significantly, however, the Summary Plan Description ("SPD") states on page 1 (emphasis added):

> In addition, when you retire on a company pension before age 65, the same medical benefits are continued by you until you reach age 65. These benefits are also available for your eligible dependent spouse *until he or she reaches age 65*

> and for your eligible dependent children. You and your dependent spouse become eligible for benefits provided under the Supplemental Major Medical Plan at the time each of you reaches age 65 and you are retired on a company pension (other than deferred).

Additionally, the following provisions in the SPD are set forth on pages 7 and 11 (emphasis added):

> LIFETIME MAMIMUM BENEFITS
>
> You and each of your covered dependents can receive up to $500,000.00 in medical care benefits. *When you or your covered spouse reaches age 65,* and you are retired on a company pension (other than deferred), the $50,000.00 lifetime maximum described under the *Supplemental Major Medical Plan* becomes effective.
>
> EXTENSION OF COVERAGE
>
> Medical coverage under the regular group major medical plan for a retired employee and a dependent spouse will stop on the day prior to the first day of the month in which each reaches age 65. See the Supplemental Major Medical Plan for coverage at age 65.

Despite the clarity of the statements regarding retiree coverage in the SPD, plaintiffs claim that the provision relating to the non-duplication of coverage on page 12 of the SPD negates what was previously stated in the two aformentioned quoted paragraphs.

Appendix C

Plaintiffs contend that the language on page 12 of the SPD applies to the very specific circumstance that they find themselves in — with a retired employee who is either himself eligible for Medicare or has a dependent who qualifies for Medicare prior to reaching age 65. However, the intent of the paragraph is clear: a retiree and/or his dependent who qualifies for Medicare prior to reaching 65 years of age, may elect to continue coverage under Graybars' Group Major Medical Plan until the receiving party reaches 65 years of age. Upon reaching 65 years of age, the beneficiary qualifies to continue his coverage with Graybar but only under the Supplemental Major Medical Plan.

Thus, this court finds that the Cleland's are not entitled to continued coverage under the Group Major Medical Plan. The clauses set forth on pages 1, 7 and 11 of the SPD explicitly state that when the employee or a dependent becomes 65 the Group Major Medical coverage ends and the Supplemental Major Medical Plan becomes effective. Consequently, this court affirms Graybar's construction of the page 12 language as applying solely to retirees and their dependents before reaching age 65 and not afterwards. Thus, Mrs. Cleland is not entitled to coverage under Graybar's Group Major Medical Plan.

With respect to plaintiffs claim under The Consolidated Omnibus Budget Reconciliation Act of 1985, 26 U.S.C. § 162(k), *et seq.* P.L. 99-272; section 162(k); Prop. Regs. § 1.162-26 (52 Fed. Reg. 22716, June 15, 1987) ("COBRA"), Mrs. Cleland is not eligible for COBRA benefits since the Act does not cover persons over age 65, who become "entitled to benefits under title XVIII of the Social Security Act." 26 U.S.C. § 162(k)(2)(B)(iv)(II). Additionally, there is no authority for plaintiffs' contention that if employees over 65 are entitled to have their Group Major

Medical benefits continued that retirees should have the same option.

Finally, the court finds that defendant Graybar did not violate 29 U.S.C. § 1132(c), because the final terms of the underlying document between Prudential and Graybar had not been agreed upon at the time the request was made.

An appropriate order follows.

Appendix C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION

NO. 88-1844

MILTON M. CLELAND and GLADYS G. CLELAND, his wife

v.

GRAYBAR ELECTRIC COMPANY, Inc.

ORDER

AND NOW, this 27th day of FEBRUARY, 1989, for the reasons set forth in the foregoing findings of Fact and Conclusions of Law, it is hereby

ORDERED

that judgment is entered as follows:

1. On plaintiffs' claim to obligate defendant to offer plaintiff Mrs. Cleland health insurance coverage under Graybar's Major Medical Plan retroactive to May 1, 1987, judgment is entered against plaintiffs, Milton M. Cleland and Gladys G. Cleland, and in favor of defendant, Graybar Electronic Company, Inc.

2. On plaintiffs' COBRA claim, judgment is entered against plaintiffs, Milton M. Cleland and Gladys G. Cleland, and in favor of defendant, Graybar Electronic Company, Inc.

Appendix C

3. On plaintiffs' ERISA claim, judgment is entered against plaintiffs, Milton M. Cleland and Gladys G. Cleland, and in favor of defendant, Graybar Electronic Company, Inc.

s/ Joseph L. McGlynn, Jr.
JOSEPH L. McGLYNN, JR.

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA DATED DECEMBER 8, 1988

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION

NO. 88-1844

MILTON M. CLELAND and GLADYS G. CLELAND, his wife

v.

GRAYBAR ELECTRIC COMPANY, INC.

ORDER

AND NOW, to wit, this day of 8th day of December, 1988, after consideration of plaintiffs' motion to compel defendant's answers to interrogatories and requests for production of documents, it is hereby

ORDERED AND DECREED that the said motion is denied.

s/ Joseph L. McGlynn, Jr.
J.

ENTERED: 12-9-88
Clerk of Court

APPENDIX E — EXCERPT OF TRANSCRIPT OF PROCEEDINGS OF JANUARY 24, 1989 BEFORE THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Commencing at page 16]

THE COURT: Well, let me just say that I don't think that the change in the standard of review as announced by the Third Circuit overruled the, what was the name of the case where they said ERISA — Turner, isn't it, Turner versus CF&I Steel Company.

MR. HACKETT: Yes, that's correct.

THE COURT: I would have to have more specific direction from the Court of Appeals telling me that they have overruled Turner versus CF&I Steel.

MR. HACKETT: On the jury trial issue.

THE COURT: On the jury trial issue. That was the only issue in CF&I Steel. They don't even mention the jury trial issue in the later case, I believe it was Frank, is that the name of it?

[17] I would be guided by the Third Circuit's ruling in CF&I Steel. And, therefore, you would not be entitled to a jury trial.

I think also that under the pleadings, there is no essential fact, there has been no change — although a party may have been added, there has been no change in the underlying facts as they have been pleaded, except maybe the husband paid out some more money, and I don't know whether that has been disputed either. But nevertheless, I think the waiver is still in effect. Your amendment does not overcome the waiver.

Appendix E

So, I will deny the motion for jury trial and I will grant the Defendant's motion to strike.

MR. HACKETT: Thank you.

THE COURT: All right, are we ready to proceed?

FILED
JAN 24 1990
JOSEPH F. SPANIOL, JR.
CLERK

89-

No. 1069

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

MILTON M. CLELAND and GLADYS G. CLELAND,
Petitioners,

v.

GRAYBAR ELECTRIC COMPANY, INC.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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DESIGNATION OF CORPORATE RELATIONSHIPS

Graybar Electric Company, Inc., filing this Brief in Opposition to Petition for Certiorari, as respondent in this proceedings, states that:

A. This is its original Designation of Corporate Relationships.

B. Graybar Electric Company, Inc. is not owned by a parent corporation.

C. Graybar Electric Company, Inc. does not have any ownership interest in any subsidiaries, excepting only wholly-owned subsidiaries.

D. Graybar Electric Company, Inc. does not have any affiliates.

TABLE OF AUTHORITIES

Cases: Page

Commonwealth of Pa. Ex. Rel. Feiling v. Sincavage, 439 F.2d 1133 (3d Cir. 1971) 3

Federal - Mogul Corp. v. N.L.R.B., 566 F.2d 1245 (5th Cir. 1978) 4

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In re Fine Paper Antitrust Litigation, 685 F.2d 810 (3d Cir. 1982), *cert. denied*, 459 U.S. 1156 (1983) 4

Otis Clap & Son, Inc. v. Filmore Vitamin Co., 754 F.2d 738 (7th Cir. 1985) 5

Rossville Salvage Corp. v. S. E. Graham Co., 319 F.2d 391 (3d Cir. 1963) 4

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Stich v. United States, 730 F.2d 115 (3d Cir. 1984), *cert. denied*, 469, U.S. 917 (1984) 4

Walton v. Eaton Corp., 563 F.2d 66 (3d Cir. 1977) 2

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No. 1069

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

MILTON M. CLELAND and GLADYS G. CLELAND,
Petitioners,

v.

GRAYBAR ELECTRIC COMPANY, INC.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

COUNTERSTATEMENT OF THE CASE

The Clelands'[1] statement of the case omits some important facts. These include (a) the language in the contract upon which the court relied in entering judgment in favor of Graybar, (b) a quotation of the discovery requests and Graybar's objections thereto on the ground that they were irrelevant, vague, indefinite and overly broad, (c) a statement to the effect that all correspondence by and between the parties and all correspondence relating to the Cleland claim had been produced during discovery, and (d) the fact that in contravention

1. Throughout this brief, "the Clelands" refers to the petitioners, Milton A. Cleland and Gladys G. Cleland, and "Graybar" refers to the respondent, Graybar Electric Company, Inc.

of a Local Rule of court, counsel for the Clelands failed to confer with counsel for Graybar prior to filing a motion to compel further answers to discovery requests.

SUMMARY OF ARGUMENT

This is not an appropriate case for the grant of *certiorari* because there are no compelling reasons for a review by this Court of the two rulings of the district court which are contested by the Clelands. These are the district court's striking of their jury trial demand and its denial of their motion to compel further responses to discovery. Neither of these matters involves any significant federal or public issue.

ARGUMENT

A. The Jury Trial Issue

The denial by the district court of a jury trial was based on two independent reasons. One reason was that the Clelands waived their right to a jury trial. That conclusion had nothing to do with the other reason which involved the unavailability of jury trials in ERISA cases. (See 18a).

The district court found that the Clelands had waived their right to demand a jury trial because their demand was not made within the time provided by Fed. R. Civ. P 38(b). The Clelands' demand for a jury trial was first made by endorsement on their motion to amend their Complaint, which was filed several months after their original Complaint and the Answer thereto had been filed.

The filing of an amended pleading does not give rise to the ability of either party to demand a jury trial when such a demand has been previously waived, unless the amended pleading raises new factual issues triable by a jury. *Walton v. Eaton Corp.*, 563 F.2d 66, 71-72 (3d Cir. 1977). In this case, no new factual issues were alleged

by the amended pleading. Mrs. Cleland admitted this fact in her memorandum of law in support of her motion for leave to amend the Complaint when she said:

> These amendments are based upon the same facts and circumstances as the original Complaint.
>
> . . . .
>
> [T]he Amended Complaint only clarified the legal basis for their rights and the type of damages [p]laintiffs claim.

The addition of Mr. Cleland as a party-plaintiff in the Second Amended Complaint did not give rise to a right to demand a jury trial because no new factual issues were raised. *Commonwealth of Pa. Ex. Rel. Feiling v. Sincavage,* 439 F.2d 1133, 1134 (3d Cir. 1971).

Another reason for the inappropriateness of a jury trial in this case is that there were no issues of fact for a jury to decide. At the trial there was a dispute relating to background facts because at that time there was an issue as to whether the "arbitrary and capricious" standard of review should be used by the district court. However, those factual issues were rendered moot by this Court's decision in *Firestone Tire & Rubber Co. v. Bruch,* 4879 U.S. __, 109 S.Ct. 948, 103 L.Ed. 2d 80 (1989) which was published after the trial in this case, but before the district court's opinion. Although the district court applied the *de novo* standard, it still held in favor of Graybar.

In their Petition, the Clelands suggest that the demand for damages set forth in their Second Amended Complaint raised an issue triable by a jury. (p. 8 of Petition) However, the Second Amended Complaint only sought declaratory judgments which, among other things, asked the district court to declare that Graybar "is legally obligated . . . to reimburse plaintiff for expenses incurred for such services . . ." In the original Complaint, Mrs. Cleland asked the district court to

declare that Graybar "is legally obligated to offer plaintiff health insurance coverage".

All of the Clelands' Complaints sought essentially the same relief – that is, a declaration of liability against Graybar and a penalty. Finally, damages were a non-issue in this case because the parties stipulated the amount of money which the Clelands were entitled to receive if there was coverage.

The basic issue in this case involved the interpretation of Graybar's Summary Plan Description, a written document. Federal law has long prescribed that contract interpretation is a matter for court determination and is not for a jury. *Rossville Salvage Corp. v. S. E. Graham Co.,* 319 F.2d 391 (3d Cir. 1963); *Federal - Mogul Corp. v. N.L.R.B.,* 566 F.2d 1245 (5th Cir. 1978).

B. The Discovery Issue

The Clelands have not set forth the factual or procedural basis for their complaint about the district court's denial of their motion to compel further discovery. They have not quoted Graybars' objections to what it contended were irrelevant, vague and overly broad discovery requests. It is also important that all correspondence between the parties or which related to the claim was produced in discovery. it was that kind of evidence which was considered in *Schultz v. Metropolitan Life Ins. Co.,* 872 F.2d 676 (5th Cir. 1989), a case upon which the Clelands rely.

The conduct of discovery is committed to the sound discretion of the district court. *Stich v. United States,* 730 F.2d 115, 117-118 (3d Cir. 1984), *cert. denied,* 469 U.S. 917 (1984); *In re Fine Paper Antitrust Litigation,* 685 F.2d 810, 817 (3d Cir. 1982), *cert. denied,* 459 U.S. 1156 (1983). To obtain a reversal of a district court's order denying a motion to compel, the complaining party must show that the denial resulted in "actual and substantial prejudice". *Otis Clap & Son, Inc. v. Filmore*

Vitamin Co., 754 F.2d 738, 734-44 (7th Cir. 1985). The Clelands have failed even to address this requirement. They do not even set forth the discovery particulars which were involved.

The Clelands also do not comment about their counsel's failure to comply with Local Rule 24(f) of the United States District Court for the Eastern District of Pennsylvania which states that:

> No motion . . . pursuant to the Federal Rules of Civil Procedure governing discovery . . . should be made unless it contains a certification of counsel that the parties after reasonable effort are unable to resolve the dispute.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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